Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning	)	DA 91-577
Regulation of Satellite	)	45-DSS-MISC-93
Earth Stations	)	

REPLY COMMENTS

The City of Coconut Creek, Florida (hereafter "City"), by its attorneys, hereby replies to the Comments of Hughes Network Systems, Inc. (hereafter "Hughes"), filed July 14, 1995, in the above-referenced rulemaking proceeding.[1] In support thereof, the City respectfully states as follows:

I. INTRODUCTION

1. On May 15, 1995, the Commission, by Notice of Proposed Rulemaking (hereafter "NPRM"), FCC 95-180, instituted the above-referenced rulemaking proceeding to modify its rule, 47 C.F.R. §25.104, concerning the preemption of local zoning regulations of satellite earth stations. The Commission invited interested persons to file comments on or before July 14, 1995, and reply comments on or before August 15, 1995.

2. Section 25.104 presently preempts state and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities unless such regulations:

a) have a reasonable and clearly defined health, safety or aesthetic objective; and

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[1] The City of Coconut Creek is a municipality situate in Broward County, Florida. It had a 1990 population of 27,485.

b) do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

Regulation of satellite transmitting antennas is preempted in the same manner except that state and local health and safety regulation is not preempted.

3. Prior to the issuance of the NPRM, the Commission entertained petitions for declaratory rulings of its satellite-antenna preemption rule after the petitioner had exhausted all other legal remedies. Under its proposed rule (and as an interim policy), the Commission now requires that petitioners only exhaust non-federal administrative remedies before requesting Commission review. (NPRM, ¶49).

4. The Commission proposes to revise its preemption regulation (see Appendix A hereto) inter alia to impose explicitly the burden of demonstrating compliance upon state and local zoning regulators and to require that "any non-federal objective offered to save a regulation from preemption must be expressly stated in the regulation itself" (NPRM, ¶67).

5. In its NPRM, the Commission declined to propose a per se preemption approach advocated by Hughes and others for two primary reasons (Ibid., ¶¶64, 65):

First, the use of rebuttable presumptions affords local authorities an opportunity to articulate the policies they are pursuing, while a per se approach essentially assumes that these local interests are of no more than secondary importance. Even though we are proposing a "waiver" provision that could permit local government to vindicate their regulations even under a per se approach, the waiver provision would require an application from the local authority, citing "local

concerns of a highly specialized or unusual nature." By contrast, the presumptions we propose could be rebutted in the context of any particular case. Second, the presumption approach is a more incremental solution to the problems cited in the record. The importance and centrality of the local interests that would be subordinated by a per se approach lead us to embrace this more moderate alternative at this time, even though we thereby risk the possibility that further Commission action will be required in the future.

II. HUGHES' COMMENTS

6. In its Comments, Hughes "reiterates its steadfast belief that the only appropriate preemption rule is a per se ban on local regulation of smaller satellite antennas." Hughes goes on to argue that if "the Commission decides to adopt the system of presumptions and rebuttals it has proposed, modifications [therein] are needed to make clear that small antenna users can rely on such a presumption and install and operate such antennas without interference or delay" (Hughes' Comments, pp. iii - iv).

7. In support of its position, Hughes asserts that local zoning and permitting officials do not as a rule know about VSAT technology, that they "do not care about national concerns" and that whether "motivated by well-intentioned concerns to maintain the 'city beautiful' or by base desires to assert the power of their fiefdoms, they often impose requirements and procedures on the installation of VSAT antennas that are slow, costly, irrational, arbitrary, and just plain foolish" (Ibid., p. 6).

8. Hughes provides a "few illustrations" of the experiences of it and its customers with nine municipalities which purport to delineate "problems [that] cry out for substantial revisions to the current rule, revisions that will be

clear and uniform, and will lift the burden of enforcing federal law from the backs of satellite antenna users" (Ibid., pp. 6-10).

9. Hughes goes on to state that sometimes "the municipality will not even make its regulations available upon request, or will add unwritten, ad hoc requirements", that sometimes "the municipality imposes costs, whether for regulatory fees or for installation requirements, that approach or exceed the cost of the VSAT antenna",[2] that "most local government officials simply do not know and, regrettably, many do not care about federal interests and the FCC's current preemption" and that Hughes "has suffered through scores of situations in which it has set out, orally or in writing the existence and applicability of Section 25.104 to a particular ordinance and received absolutely no acknowledgment from the municipality that Hughes has raised the issue or even that the section exists, let alone an analysis on the merits" (Emphasis in original) (Ibid., pp. 10-12).

III. EXHAUSTION OF LOCAL ADMINISTRATIVE REMEDIES

10. The Commission ought not to rely upon Hughes' parade of horribles as justification for either the imposition of a per se preemption of local zoning and land use regulations or the imposition of Hughes' suggested modifications to the Commission's proposed rule, which if adopted would be tantamount to a per se preemption. Hughes' view of state and local regulators is remarkably jaundiced even for an inside the beltway advocate.

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[2] "VSAT" refers to a very small aperture terminal.

Certainly, the City of Coconut Creek has had an entirely different experience with Hughes than have apparently other local land use authorities.

11. Specifically, on June 22, 1995, Hughes filed with the Commission a Petition for Declaratory Ruling to have a Coconut Creek ordinance preempted by Section 25.104 of the Commission's Rules (File No. 120-SAT-DR-95). In that case, the undisputed facts are (City's July 17, 1995 Opposition, pp. 1-3, 10):

- In December 1994 and January 1995, Hughes' customer, Amoco Oil Company (hereafter "Amoco") installed three VSAT antennas without having first obtained a building permit in violation of Section 13-38(a) of the City Code.
- The installation was made upon the advice of Hughes that its installers need not apply for permits from the City prior to the installation.[1/]
- When a city code enforcement officer issued three "Violation Warnings" to Amoco in May 1995, Hughes elected to file its petition before the Commission asserting that there were no local administrative remedies available to it.
- Contrary to Hughes' claim, one of its installers had in fact filed for a building permit in late April 1995.

1/ Section 13-38(a) of the City Code unambiguously requires a building permit for any "construction, addition, alteration, movement, repair or change to a new or different use of any building, structure, or land."

- In response to the City's disclosure to the Commission of the building permit application, Hughes shifted its ground and asserted in its July 31, 1995, Reply (p. 5) that "Hughes and Amoco sought an authorization for the installations, but the permit application was denied."
- In fact, the City had promptly processed the one building permit application which the Hughes' installer had filed and had orally advised it of defects in same but the installer has not pursued the building permit application presumably because of Hughes' subsequent filing of its Petition for Declaratory Ruling with the Commission.

12. Undoubtedly, Hughes feels perfectly justified in advocating civil disobedience, given its profound aversion to local governmental intrusion into the VSAT installation process. The plain fact, however, is that Hughes' conduct is no different from the conduct of the person recently fined by this Commission for operating an FM broadcast station without a license (see Appendix B hereto).

13. In sum, the Commission should not place credence in Hughes' fulminations against local zoning authorities. Rather, it should make plain that prospective VSAT users are expected to comply in good faith with reasonable local land use regulations and that the failure or refusal to pursue and exhaust local administrative remedies will estop prospective VSAT users from invoking the Commission's preemption regulation.

IV. THE CITY'S PERMIT PROCESS

14. As noted above (footnote 3), the City of Coconut Creek requires a permit for all construction within the City. The requirement has two main purposes:

- To ensure the safety and welfare of citizens and businesses by approving the structural, electrical, and mechanical integrity of a structure or device.
- To regulate the location (or zoning) of a structure or device to ensure aesthetic value and compatibility with its surroundings.

15. To further both purposes, the City has created a fair and equitable process to review permits applications to verify compliance with City building and zoning codes. The benefit of the process accrues to all parties; the owner of the property or building, the contractor engaging in construction, the design engineer or architect responsible for the structure or device, the City and adjacent residents and businesses. The process includes an application, structural plans, location of the work, and property owner or qualified contractor authorization to construct. After the plan and application are approved, a permit is issued and inspections made prior to a certificate of completion being issued to verify that construction is consistent with the permit.

16. In the case of satellite dish antennas and other appurtenances, the South Florida Building Code (adopted by the City of Coconut Creek) sets standards for the technical quality of construction for structural, electrical, mechanical, plumbing facilities and devices. This code was developed locally to take into consideration the high wind and flooding hazards intrinsic

to the area. Appurtenances to roofs and walls such as antennas and signs must be reviewed to ensure that:

- They do not become projectiles in high winds that could cause damage to people and property.
- They do not compromise the structural integrity of what they are being attached to. Dish antennas must also be electrically grounded in accordance with the code to protect existing electrical systems and for the safety of property owners and users.

17. The City's Land Development (or zoning) Code also provides standards for location, height and aesthetics. The purpose of zoning is to promote and improve the safety, comfort, order, appearance, and convenience of residents and businesses, through regulations which stabilize and enhance property values and provide for a uniform land pattern use. To implement these goals and promote harmonious activities and operations equitably within an area, the City regulates the location (setbacks), height and use of structures and devices (Sec. 13-292 Zoning, Purpose and Legislative Intent, City of Coconut Creek Land Development Code).

18. Aesthetic criteria are also employed, not to restrict innovation, but to assist in focusing on design principles that promote attractive visual appearances that are a factor in the preservation of taxable value of property and add to the visual comfort of residents (Ibid, Sec. 13-37 Aesthetic Design, City of Coconut Creek Land Development Code).

19. Accessory structures such as dish antennas and roof mounted mechanical equipment are required to meet front, side and rear setbacks of the applicable zoning district for consistency with primary structures. The height of a dish antenna is limited to the height of the building lot where it is located (Ibid., Sec. 13-373 Development Regulation [Accessory Structures]).

20. The aforesaid regulations of the South Florida Building Code and City of Coconut Creek Land Development Code are reasonable and enforceable. Over 20,000 permits for primary and accessory structures have been issued in accordance with the codes in the last ten years.[4/] Approximately 15 permit applicants (seven-hundredths of one percent) were not able to adhere to the regulations but were afforded the right to request a variance.

21. One example, directly on point, relates to the request of a gas station (not Amoco) to install a dish antenna on the gas pump canopy and convenience store. This company obtained a building permit within five days. The work was promptly completed and the City approved all final inspections in structural, electrical and zoning.

22. In the case of Amoco and Hughes, all options and administrative remedies related to its proposed locations were not explored prior to the filing of its Petition for Declaratory Ruling. The options and remedies available to Amoco and Hughes were (and are):

[4/] The permit process has not been reported to be onerous, time consuming or create an undue financial hardship.

- Obtain a permit prior to installation so a zoning plan reviewer can explain acceptable locations.
- After warning of illegal installations, discuss options and alternatives with Department personnel, and, if need be, with Director of Building and Zoning Department.
- File an administrative appeal of the Director's decision if his interpretation is believed to be unreasonable (Section 13-34).
- Request a variance (Section 13-33).
- Modify permit and plan and relocate the dish antennas to an appropriate location and height.

These options and remedies were made known and/or available to Hughes prior to its FCC filing.

23. In summary, the City has a strong interest in protecting the safety and rights of all affected parties. The permit process for construction and installation is easy, fair, consistent and inexpensive. The City has found that effective communication between the business community and the City need not be through petitions or other adversarial confrontation but through amicable conversation and understanding.

Respectfully submitted,

CITY OF COCONUT CREEK

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DATED: August 15, 1995
[130881.1]

APPENDIX A

For the reasons set forth in the NPRM, the Federal Communications Commission proposes to amend Title 47, Part 25 of the Code of Federal Regulations, as follows:

1. The authority citation for Part 25 continues to read as follows:

AUTHORITY: Sections 25.101 to 25.601 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 101-104, 76 Stat. 416-427; 47 U.S.C. 701-744; 47 U.S.C. 554.

2. Section 25.104 is revised to read as follows:

(a) Any state or local land-use, building, or similar regulation that substantially limits reception by receive-only antennas, or imposes substantial costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable in relation to

(1) a clearly defined, and expressly stated health, safety, or aesthetic objective; and

(2) the federal interest in fair and effective competition among competing communications service providers

(b) Any regulation covered by paragraph (a) of this section shall be presumed unreasonable if it affects the installation, maintenance, or use of:

(1) a satellite receive-only antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by local land-use regulation; or

(2) a satellite receive-only antenna that is one meter or less in diameter in any area.

(c) Any presumption arising from paragraph (b) of this section may be rebutted upon a showing that the regulation in question

(1) is necessary to accomplish a clearly defined and expressly stated health or safety objective;

(2) is no more burdensome to satellite users that is necessary to achieve the health or safety objective.

(3) is specifically applicable to antennas of the class mentioned in paragraph (b).

(d) Regulation of satellite transmitting antennas is preempted to the same extent as provided in paragraph (a) of this rule, except that state and local health and safety regulations relating to radio frequency radiation of transmitting antennas are not preempted by this rule.

(e) Any person aggrieved by the application or potential application of a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting all nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by this section. Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when

(1) the petitioner's application for a permit or other authorization required by the state or local authority has been denied and any administrative appeal has been exhausted;

(2) the petitioner's application for a permit or other authorization required by the state or local authority has been pending with that authority for ninety days;

(3) the petitioner has been informed that a permit or other authorization required by the state or local authority will be conditioned upon the petitioner's expenditure of an amount greater than the aggregate purchase and installation costs of the antenna; or

(4) a state or local authority has notified the petitioner of impending civil or criminal action in a court of law and there are no more nonfederal administrative steps to be taken.

(f) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that local concerns of a highly specialized or unusual nature create an overwhelming necessity for regulation inconsistent with this section. No application for waiver shall be considered unless it includes the particular regulation for which waiver is sought. Waivers granted according to this rule shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

APPENDIX B

NEWS

News Media Information (202) 418-0500
Recorded listing of releases and texts (202) 632-0002

FEDERAL COMMUNICATIONS COMMISSION
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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v FCC, 515 F 2d 385 (D.C. Cir. 1975)

Report No. CI 95-10 COMPLIANCE AND INFORM ACTION August 3, 1995

FCC ISSUES $10,000 FORFEITURE TO STEPHEN P. DUNIFER FOR OPERATING AN FM BROADCAST STATION WITHOUT A LICENSE

The FCC granted in part and denied in part the Application for Review filed by Stephen P. Dunifer and issued a forfeiture of $10,000 for operating an FM Broadcast station without a license.

In Dunifer's Application for Review, he contends that the Commission's broadcast rules constitute a complete ban on low power audio broadcasting and, thus, violate the First Amendment right to free speech, the Commerce Clause of the United States Constitution and international treaties. He further contends that the Bureau's action assessing the forfeiture failed to meet established procedural requirements, violated the Fifth and Sixth Amendment, and violated the Due Process and the Equal Protection Clauses of the Constitution. In addition, Mr. Dunifer argued that the $20,000 forfeiture assessed against him was excessive.

Sections 301 and 303 of the Communications Act specifically authorize the Commission to regulate intrastate as well as inter-state communications, and any communications capable of causing interference to interstate communications. Because the purpose of the Act, among other things, is to prevent interference, the Commission need not show interference to justify its regulatory scheme. With respect to the assertion that the Commission's rules violate international treaties, Mr. Dunifer has not pointed to any specific treaty or international law that allows him to broadcast without a license.

Dunifer contended that he should have received a citation or warning before the issuance of the Notice of Apparent Liability (NAL) . Due to the fact that he engaged in broadcasting, an activity for which a license is required, he was not entitled to a warning. With respect to Mr. Dunifer's Due Process claim, the Commission's monetary forfeiture can be appealed through a trial de novo in the U.S. District Court, with the opportunity for a hearing and cross-examination.

- over -

Section 503(b)(2)(C) of the Act establishes a maximum of $10,000 per violation or per day of violation for violators who are neither common carriers, cable operators nor broadcast licensees or applicants. Mr. Dunifer was only charged for one violation. In light of the intentional nature of the violation, as well as his patent disregard for the Rules, the Commission assessed the maximum forfeiture.

529

Action by the Commission August 1, 1995 by MO&O (FCC 95-333). Chairman Hundt, Commissioners Quello, Barrett, Ness and Chong.

- FCC -

News Media contact: Kara Palamaras at (202) 418-0500.
Compliance and Information Bureau contact: Ana Curtis at (202) 418-1160.

CERTIFICATE OF SERVICE

I, Virginia L. Davidson, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 15th day of August, 1995, caused to be sent by first-class U.S. mail, postage-prepaid, or where indicated served by hand, a copy of the foregoing **REPLY COMMENTS** to the following:

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